BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROBERT L. THURMAN Claimant	)	
VS.	)	
	)	Docket No. 213,203
BERRY COMPANIES, INC. Respondent	)	
AND	)	
	)	
TRAVELERS INSURANCE COMPANY Insurance Carrier	)	

ORDER

Respondent appeals from a preliminary hearing Order of June 20, 1996, wherein Administrative Law Judge Nelsonna Potts Barnes granted claimant benefits finding claimant had suffered accidental injury arising out of and in the course of his employment and, further, finding that claimant had just cause for failing to notify his employer of his injury within ten days under K.S.A. 44-520.

ISSUES

(1) Whether claimant met with personal injury by accident arising out of and in the course of his employment.

(2) Whether claimant provided notice under K.S.A. 44-520 within ten days and, if not, whether claimant had just cause for his failure to so notify the respondent.

(3) Whether certain defenses apply (alcohol consumption).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purpose of preliminary hearing, the Appeals Board finds as follows:

Claimant alleges accidental injury on or about April 4, 1996. On that date while at work, he was involved in lifting 20 to 30 boxes of paper weighing approximately 15 to 25 pounds each. He also was required to lift a 55-gallon trash container, partially full of trash, which weighed from 40 to 58 pounds.

At the time claimant was doing this lifting he felt no pain and suffered no symptomatology. Later that day, prior to the end of his shift, claimant went to the bathroom, and while urinating, felt a slight burning sensation and noticed blood in his urine. Claimant did not mention this to his employer. Claimant then went home that night and during the course of the evening consumed two beers. During the evening he again noticed blood in his urine but mentioned nothing to his wife, not wanting to alarm her.

At approximately 5 a.m. claimant awoke and found blood stains on his sheet. He again found blood in his urine and felt the burning sensation. Claimant began to experience chills and felt very thirsty. He went to the kitchen to obtain a glass of water. While there claimant became dizzy, passed out, and fell striking his back and shoulders on a glass table, breaking the table and severely cutting his back and shoulders. He was then transported to Wesley Medical Center Emergency Room and underwent medical treatment for his problems. Claimant's wife contacted the respondent and advised the respondent he was ill and would not be to work. Claimant returned to work approximately a week later and attempted to work for approximately a week but was unable to do so. Claimant first notified respondent that he was alleging a work-related injury on April 21, 1996, approximately 17 days after the alleged date of accident.

The Appeals Board will consider the above issues listed in reverse order.

With regard to respondent's allegation that certain defenses apply, alluding to the claimant's consumption of two beers, the record contains no evidence that claimant was in any way intoxicated or that claimant's injury was contributed to by his use or consumption of alcohol as is required by K.S.A. 1995 Supp. 44-501(d)(2). As such, the Appeals Board finds the allegation by respondent that this defense should preclude claimant from obtaining benefits is unsupported by the evidence and is denied.

The Board must next consider whether claimant provided notice to respondent as is required by K.S.A. 44-520. The language of K.S.A. 44-520 is clear in that claimant is under a specific obligation to notify respondent of the accident within ten days of the accident. K.S.A. 44-520 goes on to say:

> "The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause . . . ."

It is stipulated that claimant did not advise respondent of a work-related accident until April 21, 1996, 17 days after the alleged date of accident. As such, claimant did not provide notice under K.S.A. 44-520 as is required. The Appeals Board must next consider whether claimant had just cause for this failure to so notify respondent. Claimant's wife contacted the employer and advised them that he was unable to come to work due to his illness. At that time claimant was hospitalized at Wesley Medical Center. Claimant did return to work approximately one week after the date of accident and attempted to perform his job duties although with difficulties for approximately one week. During this week claimant again failed to mention to respondent that he had suffered any type of accidental injury while employed with respondent. Claimant acknowledged on cross-examination that had he gone to work on Friday, April 5, 1996, he might have said something to his employer, but since he was in the hospital he did not do so. Claimant does not explain why he did not advise respondent of his concerns during the week he was performing his duties after the alleged date of accident. The Administrative Law Judge found that claimant did not realize the significance of his injury for several days. This is hard to comprehend after claimant was hospitalized, treated with antibiotics, and returned to work with limiting restrictions as a result of what claimant alleged to be a work-related injury. The Appeals Board finds, based upon the evidence presented, that claimant did not have just cause for failing to advise respondent of the alleged work-related injury of April 4, 1996, as is required by K.S.A. 44-520.

The Board will next consider whether claimant suffered accidental injury arising out of and in the course of his employment. Claimant, in his brief to the Appeals Board, acknowledges that a causal relationship to his acute episodes of prostatitis or epididymitis led to the fainting incident, which led to claimant's more significant injuries to his neck, back, and shoulder. Claimant argues that his testimony, along with the corroborating medical evidence, is sufficient to show a connection from the initial lifting incidents of April 4, 1996, to the illness and resulting injury. The Appeals Board, in reviewing the medical evidence, finds two documents pertinent to the cause of claimant's ongoing symptomatology. The first is a report of April 22, 1996, signed by S. Sparks, M.D., which indicates claimant's fall and resulting injuries were related to his "personal illness." This document, which is part of Exhibit 4 to the preliminary hearing, does not support claimant's allegations that his ongoing symptomatology relates to the work-related lifting incident.

Claimant relies upon the second document which is the May 8, 1996, letter of Dr. James H. Gilbaugh, III, wherein Dr. Gilbaugh states as follows:

> "He reports that he developed irritative and worsening obstructive voiding symptoms after performing some heavy lifting at work. Patients with prostatic hypertrophy will on occasion develop acute episodes of prostatitis and/or epididymitis associated with heavy lifting, although it is difficult to say, in fact, whether that is what initiated the problem with Mr. Thurman. His acute prostatitis then lead [sic] to his febrile illness and fainting episode."

The Appeals Board must consider the evidence as a whole when deciding whether accidents arise out of and in the course of employment. Claimant had suffered from high blood pressure for some time and was on the medication Lasix which had increased the

frequency of his urination for approximately one week prior to the date of injury. Claimant had a prior history of urination problems and had undergone surgery in 1984 to correct problems associated with his bladder and frequent urination. The record was somewhat unclear as to whether claimant had blood in his urine at that time as, on several occasions, he discussed bleeding in the urine but then denied any preexisting bleeding in the urine before the 1996 incident. Claimant did ultimately state, on cross-examination, that he had not passed any blood in his urine since the surgery in 1984, thus indicating some prior history of blood in the urine. Claimant acknowledged that the bladder and urinary problems stem from an incident when he was 13 years old when a tree fell on him causing him significant injury.

In workers compensation matters the burden of proof is on claimant to establish claimant's right to an award of compensation and to prove the various conditions upon which claimant's right depends by a preponderance of the credible evidence. K.S.A. 1995 Supp. 44-501(a) and K.S.A. 1995 Supp. 44-508(g).

Further, in order to recover benefits, claimant must establish that he sustained a personal injury by accident arising out of and in the course of his employment. These are separate elements which must be proven in order for the claim to be compensable. Newman v. Bennett, 212 Kan. 562, 512 P.2d 497 (1973). In order to establish that the incident did "arise out of the employment", claimant must show that there is some causal connection between the accident, injury, and the employment. To do this, it must be shown that the injury arose out of the nature, conditions, obligations, and incidents of the employment. Only risks associated with the work place are compensable. "In the course of employment" relates to time, place, and circumstances under which the accident occurred, and that the injury happened while the employee was at work at his or her employer's service. Hormann v. New Hampshire Ins. Co., 236 Kan. 190, 689 P.2d 837 (1984).

In order for this claim to be compensable claimant must prove by a preponderance of the credible evidence that his prostatitis or epididymitis stemmed from or was aggravated by the lifting incidents on April 4, 1996, and led to the fainting spells wherein claimant injured his shoulder, neck, and back. The medical evidence does not support this finding. Dr. Sparks' medical report of April 22, 1996, attributes claimant's symptomatology to his personal illness. The report of Dr. Gilbaugh is ambiguous in that he states that "it is difficult to say, in fact, whether that is what initiated the problem with Mr. Thurman." It is claimant's burden to establish his right to an award by proving all the various conditions by which his right to a recovery depends. This must be established by a preponderance of the "credible" evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

The Appeals Board finds, after reviewing the medical evidence and claimant's testimony, that claimant has failed to prove by a preponderance of the credible evidence that his prostatitis and epididymitis and the resulting fainting spells stemmed from the lifting incidents of April 4, 1996. As such, claimant has failed to prove he suffered accidental injury arising out of and in the course of his employment with respondent.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that, for preliminary hearing purposes, the Order of Administrative Law Judge Nelsonna Potts Barnes dated June 20, 1996, should be, and is hereby, reversed and claimant, Robert L. Thurman, is denied benefits against Berry Companies, Inc., and its insurance carrier, Travelers Insurance Company, for the alleged accidents of April 4, 1996.

IT IS SO ORDERED.

Dated this ____ day of August 1996.

BOARD MEMBER

c: David M. Bryan, Wichita, KS
William L. Townsley, III, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director